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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/529,799	03/30/2005	Lee Ann Olson	2866(203-3509)	5362
50855 7590 02/19/2009 Tyco Healthcare Group LP 60 MIDDLETOWN AVENUE NORTH HAVEN, CT 06473				
EXAMINER				
LOPEZ, MICHELLE				
ART UNIT		PAPER NUMBER		
3721				
MAIL DATE		DELIVERY MODE		
02/19/2009		PAPER		

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

**Advisory Action
Before the Filing of an Appeal Brief**

Application No.

10/529,799

Applicant(s)

OLSON ET AL.

Examiner

Michelle Lopez

Art Unit

3721

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 22 January 2009 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☒ The period for reply expires 3 months from the mailing date of the final rejection.
b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.
Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
(b) ☐ They raise the issue of new matter (see NOTE below);
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☒ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☒ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
The status of the claim(s) is (or will be) as follows:
Claim(s) allowed: _____.
Claim(s) objected to: _____.
Claim(s) rejected: 32-36 and 39-41.
Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:
See Continuation Sheet.
12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s). _____.
13. ☐ Other: _____.

/Rinaldi I Rada/
Supervisory Patent Examiner, Art Unit 3721

Continuation of 11, does NOT place the application in condition for allowance because: Applicant submits that the asserted pulley mechanism (48) of Bolanos does not move any structure from a first proximal position to a second distal position.

This is not found persuasive as claims are given their broadest reasonable interpretation consistent with the specification. In this instance, claim 32 does not specify when the movement between a first proximal position and second distal position occurs. It is the examiner's position that Bolanos' apparatus, at one point of the operation, will move the staple ejectors (28) from a proximal position to a distal position via the pulley mechanism (28), e.g. after the staples have been fired. Furthermore, the claim does not describe any specific structure to perform such function. Claim 32 merely recites "at least one pulley ... to effect movement of the dynamic clamping member from the first proximal position to the second position". It is the examiner's position that Bolanos, indeed, shows a pulley mechanism that is capable of performing the recited function that applicant is referring to.

Also, applicant submit that there would be no objective reason to modify Fontayne to include the drive assembly (212) of Milliman because Milliman's drive assembly would result in redundancy of clamp collar (90) of Fontayne. Examiner strongly disagrees and contends that the modification of Fontayne in view of Milliman is proper. Note that Milliman is relied upon to show the use of a dynamic clamping member being configured to slidably engage the anvil and the cartridge assembly during ejection of the staples. It's acknowledged that Fontayne's clamp collar (90) move the anvil assembly in relation to the cartridge assembly at an initial point of the operation, however Fontayne's collar does not slidably engage the anvil and the cartridge assembly during ejection of the staples. It would be within the abilities of one having ordinary skill in the art to apply Milliman's concept of using a dynamic clamping member being configured to slidably engage the anvil and the cartridge assembly during ejection of the staples in order to maintain a uniform tissue gap during ejection of the staples adjacent said dynamic clamping member.

For the reasons stated above, the grounds of the final rejection are deemed proper.